

2013 WL 6179435 (N.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, N.D. California.
San Jose Division

Janice O'BRIEN, an individual, Plaintiff,
v.
CONTINENTAL CASUALTY COMPANY, and Does 1 through 100, inclusive, Defendants.

No. 5:13-cv-01289-EJD.
April 12, 2013.

**Opposition to Defendant Continental Casualty Company's Motion to
Dismiss Plaintiff's Third Cause of Action for Financial Elder Abuse**

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Date: August 9, 2013

Time: 9:00 a.m.

Courtroom: 4

I. INTRODUCTION

This case arises from an unfair and unlawful scheme perpetrated by Continental Casualty Company (more commonly known as, and therefore, hereinafter referred to as "CNA") to delay and deny valid claims for coverage submitted by long-term care policyholders in California.

At the center of the scheme is CNA's abusive claims process -- a protocol designed to frustrate and confuse policyholders with needless demands for irrelevant information in violation of CNA's own policy and California law.

The victims of this scheme are among society's most vulnerable. Long-term care policyholders are often elderly and infirm. Their reliance on long-term care is itself evidence of their vulnerability, as these products purport to defray the cost of caregivers when such care becomes an unfortunate necessity.

CNA likes to say it protects the interests of its policyholders. Its website boasts of "providing outstanding service and an ongoing commitment to building long-term relationships, earning us a reputation for being a carrier that inspires trust." The long-term care insurance similarly assures that "[t]his dedication to our customers, business partners and local communities differentiates us from other carriers and enables us to attract and retain a team of outstanding insurance professionals who keep the customer at the heart of everything we do. When you're looking for a strong insurance carrier, dedicated to your success ... we can show you more."

These assurances could not be farther from the truth. In fact, CNA deliberately places demands upon policyholders that are so steeped in obfuscation that their purpose could only be to cook up grounds to deny claims.

Plaintiff Janice O'Brien is a victim of this scheme. Ms. O'Brien is a 91-year old widow and mother of seven. In 1996, she purchased long-term care insurance from CNA. In 2011, she submitted a claim for personal care benefits. For the past 21

months, CNA has repeatedly denied payment on this claim despite overwhelming evidence justifying Ms. O'Brien's medical need for benefits under her policy.

Ms. O'Brien filed her lawsuit in Monterey County Superior Court on February 8, 2013. Her Complaint alleges Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, and Financial **Elder Abuse** under [Welfare & Institutions Code Section 15610.30 et seq.](#)

On March 21, 2013, defendant CNA removed the action to federal court. In this proceeding, CNA has filed a Motion the third cause of action for Financial **Elder Abuse** on grounds that the allegations are insufficiently bare, conclusory and legally insufficient, and because allowing Ms. O'Brien to move forward with this claim would inappropriately allow her to recover attorneys fees and costs on what is essentially a contract dispute. (Motion at 2)

As a threshold matter, the Court should not consider CNA's Motion to Dismiss until CNA properly establishes jurisdiction in this Court. Ms. O'Brien is preparing to file a Motion to Remand by April 22, 2013.

Should the Court consider CNA's Motion to Dismiss, however, it should deny the motion as Ms. O'Brien has pled sufficient facts to state a claim for financial **elder abuse**.

II. STATEMENT OF FACTS

In 1996, Ms. O'Brien, who is now 91 years old, purchased a long-term care insurance policy from CNA. She has paid all of her premiums since then. (Complaint, ¶¶16-17)

Ms. O'Brien's policy provides benefits for personal care services that are medically necessary, due to the inability to perform two or more activities of daily living, or due to cognitive impairment. Her policy pays a daily benefit of up to \$175. She is eligible to receive this benefit for life. (*Id.*, ¶¶18-19)

Several years ago, Ms. O'Brien began experiencing dizziness and signs of [dementia](#). On July 15, 2011, she was admitted to the hospital for extreme weakness and [hyponatremia](#). (*Id.*, ¶¶25-26) Ms. O'Brien's primary care physician, Dr. David Straface, determined that she should no longer be permitted to live alone. Her family hired three personal caregivers to assist Ms. O'Brien on a daily basis with feeding, bathing, dressing, toileting/ continence, walking/ mobility/ ambulating, administering medication, preparing meals, cleaning, and laundry. (*Id.*, ¶27)

Ms. O'Brien's family made sure each caregiver was licensed, certified, and able to complete a weekly timesheet for daily notes to ensure the approval of benefits under her long-term care policy. (*Id.*, ¶29)

In July 2011, Ms. O'Brien submitted a claim to CNA. She completed all necessary forms, provided the insurer with daily visit notes completed by her caregivers, and copies of checks evidencing payment to her caregivers for their services. (*Id.*, ¶30)

Dr. Straface provided information in support of the claim. He provided CNA with a Plan of Care that explained Ms. O'Brien's inability to eat and administer medicine without supervision. Dr. Straface indicated that he anticipated these impairments would continue indefinitely. He informed CNA that Ms. O'Brien would need "ongoing assistance" with these services. He also diagnosed her with [hypertension](#), [hyponatremia](#), and cognitive impairment. Ms. O'Brien's caregivers also supported her claim. (*Id.*, ¶¶31-32)

CNA rejected the information provided by Dr. Straface and denied the claim on the basis of its own nursing assessment. (*Id.*, ¶34)

On January 17, 2012, Ms. O'Brien appealed CNA's denial. Dr. Straface also sent a letter to CNA appealing the denial. (*Id.*, ¶35)

On February 17, 2012, Ms. O'Brien returned to Dr. Straface's office due to increased bouts of dizziness. He confirmed her diagnosis of chronic cognitive impairment. Ms. O'Brien also tested positive for [memory impairment](#). Meanwhile, on March 14, 2012, neurologist Dr. Alejandro Centurion treated Ms. O'Brien's worsening dizziness. Dr. Centurion diagnosed her with mild [dementia](#) and noted that she "probably has early Alzheimer's." (*Id.*, ¶¶36-37)

On March 26, 2012, CNA upheld its denial of Ms. O'Brien's claim. (*Id.*, ¶38)

On April 4, 2012, Ms. O'Brien again appealed CNA's denial. On or about this time, Dr. Straface filled out a second Plan of Care form indicating that in May 2011 he diagnosed Ms. O'Brien with [dementia](#) and [memory loss](#). He also indicated that Ms. O'Brien suffered from [hypertension](#) dating back to approximately 2002, and from [hyponatremia](#) dating back to 2010, both of which necessitated her ongoing long-term care services. Finally, he noted the significant drop in Ms. O'Brien's cognitive capabilities. (*Id.*, ¶¶40-41)

Dr. Straface also marked that Ms. O'Brien lacked full functional capacity to perform the following Activities of Daily Living: eating, administration of medicine and ambulating. He stated: "Mrs. O'Brien requires care and assistance in the areas noted above including supervision of medication administration, ensuring adequate nutrition and assisting with ambulating at times. This could likely be done with home health personnel on a daily basis for 8-12 hours each day in the setting of Mrs. O'Brien's home." (*Id.*, ¶42)

Dr. Centurion also filled out a Plan of Care form for CNA in which he indicated that Ms. O'Brien's dementia stretched back to the summer of 2011, and that such a diagnosis results in the need for long-term care services. He stated that Ms. O'Brien: "Cannot prepare meals. Requires supervision while eating to make sure meals are eaten. Requires assistance getting in and out of tub. Needs assistance while dressing for balance stability. Completely dependent on administration of all medications. Needs assistance transferring to and from. Does not use mobility device. Occasionally requires assistance when dizzy ... Patient requires assistance by a qualified caregiver 10-12 hours a day, seven days a week." The functional impairments, he added, were "permanent and progressive." (*Id.*, ¶43)

Even so, on April 25, CNA sent a third denial letter. (*Id.*, ¶¶44-45)

On July 6, 2012, Dr. Straface wrote the following office visit note regarding Ms. O'Brien's need for long-term care:

Still trying to get long term care insurance. Continues to need supervision of medication administration. Has increased need in terms of meal preparation, some reminders about eating and obtained food for meal preparation. There are also increased concerns re her stability and need for security psychologically. She now has required nearly constant supervision some of which is done by visiting family including 8-10 hours per day 5 days a week in which the family has hired caregivers to assist and supervise her ... Positive for confusion/ disorientation, dizziness, [memory impairment](#) ... Assessment/ plan: [Dementia](#). ... Clearly she is not able to supervise her medication administration and oversee her ADL's as she would be at risk of neglect with respect to her nutrition and potentially her safety with respect to judgment as to physical activity. They will recontact their long term care insurance administrator. I also recommend that they have f/u with Dr. Centurion to reassess. (*Id.*, ¶47)

CNA next obligated Ms. O'Brien to undergo an examination by an independent medical examiner of its choosing. On November 5, 2012, the examination was conducted by clinical psychologist Dr. Patricia McKeon. CNA paid Dr. McKeon to perform the service. (*Id.*, ¶49)

Dr. McKeon noted that Ms. O'Brien could not list her medications or her medical conditions. Dr. McKeon stated: "I highly doubt that the history that she gave me was accurate given discrepancies in time frames and her own self-corrections at times."

During the examination, for instance, Ms. O'Brien indicated that she had five children, and could not name her grandchildren or great grandchildren. (*Id.*, ¶50)

Dr. McKeon tested Ms. O'Brien's mental status, orientation, attention/concentration, functional cognitive skills, learning and memory functions, long term memory, visual spatial perception and reasoning skills, abstract reasoning, judgment, executive functions and cognitive flexibility and personality and emotional factors. With *all* of these tests, Dr. McKeon noted mild to moderate deficits. For instance, Ms. O'Brien scored "Well Below Average" in her functional cognitive skills test. (*Id.*, ¶51)

In terms of memory functions, Dr. McKeon stated: "her memory function deficits lie in the realm of initial storage, not retrieval. This is very much consistent with a diagnosis of [Alzheimer's disease](#), rather than any functional issue." (*Id.*, ¶52)

Dr. McKeon indicated that Ms. O'Brien's prior diagnosis of Mild Cognitive Impairment progressed to a diagnosis of Probable [Alzheimer's Disease](#), and that Ms. O'Brien's cognitive abilities would continue to deteriorate. (*Id.*, ¶54)

Significantly, Dr. McKeon also objected to CNA's instruction that she refrain from interviewing Ms. O'Brien's children about her capacity. Dr. McKeon wrote: "This is NOT my usual practice and I believe [this] is problematic vis a vis determining the issues in this case. Given Janice's memory and cognitive problems, she is not accurate her appraisal of her own limitations. Especially in the early stages of dementia when an individual's expressive language and cognition appear to be superficially well-preserved, I find that their actual behaviors (versus what they SAY they can do) often are very discrepant." (*Id.*, ¶56)

Despite Dr. McKeon's findings, CNA has yet to approve benefits for Ms. O'Brien or even make a decision on her claims. (*Id.*, ¶57)

III. A MOTION TO DISMISS MUST BE DENIED IF THE COMPLAINT HAS PLED SUFFICIENT FACTS TO ENTITLE THE PLEADER TO RELIEF

A Rule 12(b)(6) motion is similar to the common law general demurer-i.e., it tests the legal sufficiency of the claim or claims stated in the complaint. (*De La Cruz v. Tormey* (9th Cir. 1978) 582 F.2d 45, 48.) For purposes of Rule 12(b)(6), "claim means a set of facts that, if established, entitle the pleader to relief." (*Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544, 555.)

IV. MS. O'BRIEN HAS SUFFICIENTLY PLED FINANCIAL ELDER ABUSE

CNA argues that the allegations supporting Ms. O'Brien's Financial **Elder Abuse** claim are bare, conclusory and legally insufficient, and that allowing her to move forward with her claim would inappropriately permit her to recover attorney fees and costs on a standard breach of contract case. (Motion at 2) CNA is wrong.

Ms. O'Brien has satisfied her pleading requirements. A complaint filed in federal court requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." ([Federal Rule of Civil Procedure 8\(a\)\(2\)](#)). The complaint is sufficient if it gives the defendant "fair notice of what the claim is and the grounds upon which it rests." (*Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544, 555) The complaint need not contain detailed factual allegations supporting the claim. Instead, federal courts and litigants "must rely on summary judgment and control of discovery to weed out unmeritorious claims. (*Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit* (1993) 507 U.S. 163, 168-169)

Ms. O'Brien's Complaint provides CNA with fair notice of her Financial **Elder Abuse** claim and the grounds upon which it rests. Specifically, it alleges that the 91-year old Ms. O'Brien purchased a long-term care insurance policy from CNA that promised to pay lifetime benefits of up to \$175 per day for personal care services. (Complaint, ¶¶16-19) In July 2011, she submitted a claim to CNA to obtain such benefits. She provided CNA with all necessary materials and information supporting her claim. (*Id.*, ¶30) Her treating physicians attested to her cognitive impairment and need for personal care. (*Id.*, ¶¶31-32) Nevertheless,

CNA denied the claim, and then denied her appeals. (*Id.*, ¶¶ 35, 40-41, 57) By doing so, CNA wrongfully retained a property right owed to Ms. O'Brien -- namely, benefits due under her policy.

These allegations also satisfy the facial requirements of [Welfare & Institutions Code section 15610.30](#). This provision provides:

(a) “Financial **abuse**” of an **elder** or dependent adult occurs when a person or entity does any of the following:

(1) Takes, secretes, appropriates, obtains, or retains real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.

(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.

(3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an **elder** or dependent adult by undue influence, as defined in [Section 1575 of the Civil Code](#).

(b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the **elder** or dependent adult.

(c) For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an **elder** or dependent adult is deprived of any property right, including by means of an agreement, donative, transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an **elder** or dependent adult...

This code section defines financial **abuse** “broadly.” (Balisok, [Elder Abuse Litigation](#) (The Rutter Group 2012) paragraphs 8:2, in the section entitled “Financial **Abuse** Broadly Defined.”) Indeed, CNA “shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if it knew or should have known that this conduct is likely to be harmful to Ms. O'Brien. ([Welf. & Inst. Code §15610.30\(b\)](#)) Ms. O'Brien's Complaint infers that CNA knew or should have known its denial was likely to harm her since both Ms. O'Brien and her treating physicians informed the insurer of her need for personal care services. (Complaint, ¶¶ 27, 29, 30-47) Ms. O'Brien's repeated appeals should have also alerted CNA to the harmful affect of its denials. (*Id.*, ¶¶ 35, 40-41, 57)

Under [§15610.30\(c\)](#), CNA takes, secretes, appropriates, obtains, or retains real or personal property when an **elder** is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an **elder**. ([Welf. & Inst. Code §15610.30\(c\)](#))

Ms. O'Brien's long-term care insurance policy is property. ([Cal.Civ. Code §654](#) (“[t]he ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property.”); *In re Mendenhall's Estate*, 182 Cal.App.2d 441, 444 (1960) ([a]n insurance policy is property. It can be sold, assigned or bequeathed by the owner. Its pecuniary value is the same as though the owner held a promissory note of the insurance company payable on condition.”) *Blethen v. Pac. Mut. Life Ins. Co. of Cal.*, 198 Cal. 91, 98 (1926) (“[a]n insurance policy in legal contemplation is property. It could be sold, assigned or bequeathed by the owner thereof. Its pecuniary value to its owners was as great as though they held a promissory note of the company for that amount, payable upon the same conditions.”))

CNA's denial deprived Ms. O'Brien of her property. Under [§15610.30](#), the loss of the right to performance under a contract is considered the deprivation of property. (*Bonfigli v. Strachan* (2011) 192 Cal.App.4th 1302, 1316-1317)

In fact, the legislature specifically contemplated that long-term care insurance contracts would be deemed property when it introduced an amendment to [§15610.30](#) in 2000. “This bill would impose the duty of honesty, good faith, and fair dealing on

insurers...engaged in the business of... long-term care insurance with respect to prospective policyholders.” (Cal.Legis. 442 (West 2000))

Lastly, Ms. O'Brien's Financial **Elder Abuse** does not impermissibly allow for the recovery of attorney fees on a standard contract dispute. As mentioned above, §15610.30 has been interpreted to encompass contract disputes. Moreover, when it enacted the **Elder Abuse** and Dependent Adult Civil Protection Act in 1991, the legislature expressly allowed for the recovery of attorney fees. (Balisok, **Elder Abuse** Litigation (The Rutter Group 2012) paragraphs 22:5, entitled “1991 Enactment of **Elder Abuse** and Dependent Adult Civil Protection Act,” explaining that in enacting the Act, the legislature intended interested parties to engage attorneys to take up the cause of **abused elderly** persons, and, upon a specified showing, provided for attorney fees.) In 2004, the legislature amended the Act to make attorney fees available on a showing of preponderance of evidence of financial **abuse**, rather than clear and convincing. (Balisok, **Elder Abuse** Litigation (The Rutter Group 2012) paragraphs 22:9, entitled “2004 Enactment to Redefine “Fiduciary **Abuse**” as “Financial **Abuse**” and to Provide for Reduced Standard of Proof for Remedy of Attorney Fees.”)

V. CONCLUSION

The Court should deny CNA's Motion to Dismiss. Should the Court decide to grant the motion, however, it should grant Ms. O'Brien leave to amend her Complaint.

Dated: April 11, 2013

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